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FILED
JUN 18 1985
ALEXANDER L. STEVAS,
CLERK

84-1964

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

* *

MANCE JUNIOR TERRY,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

* *

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

* *

BRIEF OF PETITIONER

* *

RONDA H. LACEY
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1800 South 12th Avenue
Birmingham, Alabama 35205
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ATTORNEY FOR PETITIONER

24 pp

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QUESTIONS PRESENTED

1. Whether the search of a residence by police officers without consent; without warrant; and without exigent circumstances is legal.

2. Whether an accused can be convicted of Violation of the Alabama Uniform Controlled Substances Act, without proof of ownership and/or knowledge of contraband.

PARTIES

In the Circuit Court for Jefferson County, Alabama, Bessemer Division, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Mance Junior Terry, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court for Jefferson County, Alabama, Bessemer Division, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Alabama affirming Petitioner's conviction has not as yet been reported, but will be reported as follows:

Terry v. State, _____ So. 2d _____ (Cr.App.Ala. 1984)

A copy of the opinions are submitted in Appendix "A" to this petition.

The order of the Alabama Supreme Court denying Petitioner's writ of certiorari has not as yet been reported, but will be reported as follows:

Ex Parte: Mance Junior Terry
In re: Terry v. State, _____
So.2d _____ (S.Ct.Ala., 1984)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on April 19, 1985, and this petition is filed within sixty (60) days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioner's write include the Fourth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATEMENT OF CASE AND FACTS

I

Petitioner was tried on a charge of Violation of the Alabama Uniform Controlled Substances Act and convicted. An appeal followed to the Alabama Court of Criminal Appeals.

Petitioner raised two issues on appeal: Whether the search of a residence by police officers without consent and without warrant is legal and whether an accused can be convicted on Violation of the Alabama Uniform Controlled Substances Act, without proof of ownership and/or knowledge of contraband.

On January 8, 1985, the Court of Criminal Appeals in its first opinion affirmed the conviction of the Circuit Court, the copy of which is submitted as Appendix "A-1".

Subsequent to your Petitioner's application for rehearing and motion pursuant to Rule 39(k) of the Alabama Rules of Criminal Procedures, a second opinion dated February 12, 1985, was issued and is submitted as Appendix "A-2".

Your Petitioner then requested a petition of writ of certiorari to the Court of Criminal Appeals of Alabama alleging substantially the same issues as have been raised here. The same was denied on April 19, 1985.

II

The petition is based on the following facts:

Petitioner resided in the residence located at 486 Carriage Hills Drive, Bessemer, Alabama, which was owned by his brother, Dwight Dwayne Terry. Petitioner resided

there with his wife.

Testimony was presented that other individuals also had access to the residence. On the day in question, a neighbor phoned and reported that two black males were entering the residence. Upon the arrival of police officers to the scene, two black males meeting the description phoned in were seen traveling in a direction away from the residence. The officers then, hearing no sounds or noises to indicate anyone was still in the home, then proceeded to search the residence of your Petitioner. Contraband was subsequently found in a chest in a "spare" bedroom in the premises.

Petitioner was arrested upon his arrival to the residence and charged with Violation of the Alabama Uniform Controlled Substances Act.

The two black males were arrested and charged with Violation of the Alabama Uniform Controlled Substances Act but were not charged with burglary, even though they had merchandise that was identified as belonging to your Petitioner.

ARGUMENT

I

Petitioner presents a very difficult question for this Court: Whether a search by police officers, without consent, without warrant, and without exigent circumstances, violate an individual's rights under the Fourth Amendment of the United States Constitution, where the search was subsequent to a report of a suspected burglary of a residence; subsequent to a report that the only two known suspects were an another location; without knowledge of what, if anything, could have been missing from the residence; within daylight hours such that a warrant could have been obtained; and further with no exigent circumstances surrounding the residence in question.

Petitioner submits that the testimony at trial was undisputed that the police officers had received a call of a suspected burglary of a residence on Carriage Hills Drive, also, that one of the officers had seen two black males meeting the description of the only two reported suspects several blocks away from the residence. Prior to the officers' entrance into the residence, there were no sounds or noises that would depict or indicate that individuals were inside the home. No identifying statements were given by police officers prior to the entrance and neither officer requested a warrant.

Petitioner submits that the search and subsequent seizure of contraband by the officers was illegal and in violation of the Fourth

Amendment requirement of a search warrant. That the search herein does not fall within the new good faith exception to the requirement of a warrant as recently handed down by this Court in United States v. Leon, et al, No. 82-1771, July 5, 1984. Petitioner submits that this Court in Michigan v. Clifford, _____ U.S. _____, 78 L.Ed.2d 477, 104 S.Ct. _____, January 11, 1984, held that a warrantless and nonconsentual search of a fire damaged house, violated the homeowner's Fourth Amendment rights. That where a legitimate privacy interest exists, the exigent circumstances do not justify the search.

Petitioner submits that the report of a suspected burglary does not remove an individual's right and

expectation of privacy. That Petitioner, more so than an individual owning a fire damaged home, retained a reasonable privacy interest in a residence. The sheer fact that a possible burglary was reported does not provide exigent circumstances, in light of the fact that the only two reported suspects were seen traveling in a direction away from the home that would waive the requirement of a search warrant. U.S. v. Kinney, 638 F.2d 941 (1981) held that noises coming from an occupied dwelling did not constitute a physical threat where the arrest was outside the residence. The Court in Kinney also pointed out that there were no cars in the area and no sounds within the building indicating that there was no possible way for an individual to

escape.

The statement by the officers in rebuttal that they were looking for suspects is not consistent with their actions, as no precautionary measures were taken to protect themselves from any suspected burglars or felons.

The other argument by the State, that the contraband was in plain view is without merit. An illegal entry cannot be made and then rely on the plain view doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Petitioner submits that the entry into the residence was illegal, the same was in violation of his constitutional expectation of privacy, and was not within any known exception to the requirement for a search

warrant.

II

Petitioner further submits that upon the failure of the State of Alabama to prove ownership of the residence in contraband, insufficient evidence was submitted and therefore no conviction should result.

The testimony at trial was undisputed that Appellant did not own the residence where the contraband was seized. Appellant was residing at the residence along with his wife and other individuals had access and regularly came to and from the residence in question.

Cason v. State, 435 So.2d 200 (1983), held that the presence of an accused in an automobile, where controlled substances were found is not sufficient in and of itself to

establish constructive possession or knowledge of presence of the substance. Here, the fact that Petitioner resided in the residence is not enough in and of itself to establish constructive possession or knowledge of any contraband.

The State of Alabama made no attempt to ascertain who owned or controlled the residence in question and specifically the room or bedroom in question where the contraband was seized. In Crane v. State, 401 So.2d 148, writ denied 401 So.2d 151 (1981), the Court held that a Defendant could not have been in constructive possession as required to establish culpability, where the Defendant was not shown to have owned or controlled the apartment where contraband was

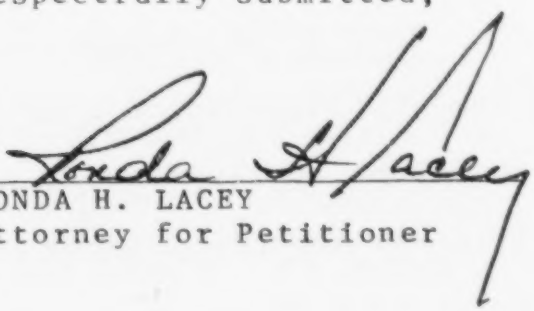
found; and where no attempt was made by searching officers to ascertain the name of the person in whose bedroom the marijuana was found or to ascertain the name of the persons to whom items in the bedroom belonged.

The requirement is, that knowledge of the presence of contraband must be shown beyond a reasonable doubt, and this has not been done by the State of Alabama in this case. Jones v. State, 432 So.2d 5 (1983).

CONCLUSION

Petitioner, Mance Junior Terry, respectfully submits that the decisions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in his case presents conflict with prior decisions and opinions of this Honorable Court on numerous different points of constitutional law. Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions of the Courts of Alabama and on such review will reverse the decision of the Alabama Court and hold that the State of Alabama violated Petitioner's constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

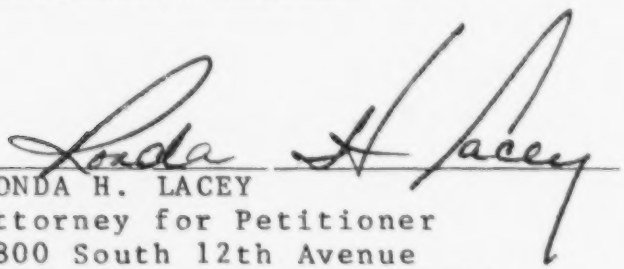


RONDA H. LACEY
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, this the _____ day of June _____, 1985, and addressed as follows:

Honorable Charles Graddick
Attorney General
250 Administrative Building
Montgomery, Alabama 36130



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APPENDIX "A-1"

JAN 8 1985

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1984-85

6 Div. 516

Mance Junior Terry

v

State

Appeal from Jefferson Circuit Court
Bessemer Division

BOWEN, PRESIDING JUDGE

Mance Junior Terry was indicted and convicted for the possession of marijuana in violation of Alabama Code, 1975, Section 20-2-70. Sentence was five years' imprisonment. Two issues are raised on appeal.

I

For the purpose of protecting the property of the owner or occupant, law enforcement officers may enter a residence without a warrant where they reasonable believe that the premises are being or have recently been burglarized. W. LaFave, 2 Search and Seizure Section 6.6(b) (1978).

In denying the defendant's motion to suppress the marijuana seized from his residence, the trial court found:

> "I'm going to deny your motion to suppress, finding that the officers were lawfully on the premises, having responded to a call a burglary was in progress. Upon arriving at the scene, my recollection is that they found a window and a door opened. They entered the residence, investigated that accusation or report of a crime, and while there made an inadvertent observation of contraband in plain view."

On the morning of June 21, 1982, a neighbor reported to the Bessemer Police that a burglary was in progress at 486 Carriage Hills Drive. Motor Scout Officers Nunnelly and Cruce responded and noticed that a basement window and the front door were open. Two police officers entered and "checked all the rooms" looking "any place anybody could have been hidden." In plain view in a bedroom, the officers found "small envelopes all over the floor and the beds." They

looked in a large trunk "which the lock had been pried off and the lid was open" and observed several clear bags which contained marijuana.

In responding to the burglary call, Officer Cruce observed two suspects "about a half block" away from the house. Upon arriving at the house, he radioed for another officer to stop the suspects.

Sergeant Howell received Officer Cruce's request for assistance and stopped the automobile the two suspects were in. The suspects voluntarily returned to the house and consented to a search of the trunk of the car. In the car trunk was a quantity of marijuana and $2,829.19.

There is nothing in the record to suggest that the officers entered

the premises for any purpose other than to provide for its security and to ascertain that no burglar was still inside. There is nothing in the record to support the defendant's allegation that the police knew there were only two suspects involved in the burglary when they arrived on the scene. Under these circumstances, the officers' search was reasonable.

> "A prudent officer was warranted in believing that a felony had been attempted or committed and in concluding that prompt entry into the home was necessary to protect the property and determine whether the suspect was hiding in the house. State v. Schrag (1975), 21 Or.App. 655, 536 P.2d 461; Henry v. United States (1959), 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed. 2d 134; Draper v. United States (1959), 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327.
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> "As the officers' entry and search for the suspect was lawful, the incidental discovery of the contraband

during the course of the search was likewise lawful under the 'plain view' doctrine. Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. It is well settled that an object in plain view of an officer who lawfully is in a position to have that view is subject to seizure. Harris v. United States (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067. Montana has applied this principle and stated the rule in this language:

> "'The rule is: Where there is prior justification for the police to search an area, and in searching the are, they inadvertently find incriminating evidence which they had no reason to anticipate, they may lawfully seize that incriminating evidence.' State v. Gallagher (1973), 162 Mont. 155, 167, 509 P.2d 852, 858.

"Here the officers were not searching for drugs but for a suspected burglar. They had no reason to suspect the presence of contraband in

> the house. Their search was limited to places where the suspect might be hiding. The permissible scope of the search is as broad as is reasonably necessary to prevent the escape of the suspect from the house. Warden v. Hayden (1967), 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782." State ex rel. Zander v. District Court, 180 Mont. 548, 591 P.2d 656, 659 (1979).

See also United States v. Estese, 479 F.2d 1273 (6th Cir. 1973).

Even where the police observe a fleeing suspect, their entry may be justified.

> "It is reasonable for officers, responding to a request for police assistance and with probable cause to believe that an open, unsecured dwelling has been recently burglarized, to immediately enter the dwelling without a warrant for the limited purposes of investigating the crime, rendering aid to any possible victims of the felony, protecting the occupant's property, and searching for remaining suspects. Cf.

United States v. Langley, 466 F.2d 27 (6th Cir. 1972); State v. Proctor, 12 Wash.App. 274, 529 P.2d 472 (1974)." State v. Campbell, 15 Wash.App. 98, 547 P.2d 295 (1976).

"It would defy reason to suppose that . . . (the police) had to leave the area and secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested. It is only 'unreasonable' searches and seizures that the fourth amendment forbids." United States v. Singer, 687 F.2d 1135, 1144 (8th Cir. 1982), reversed on other grounds on rehearing, 710 F.2d 431 (8th Cir. 1983).

The officers' warrantless entry into the residence is justified by reasoning similar to that expressed by the Supreme Court of the United States in defining the public safety

exceptions to the requirements of Miranda. New York v. Quarles, 467 U.S. _____, 104 S.Ct. 2626, _____ L.Ed.2d _____ (1984). See also Mincey v. Arizona, 437 U.S. 385, 392-393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978) ("We do not question the right of the police to respond to emergency situations . . . (W)hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if the killer is still on the premises . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.").

II

The defendant contends that the evidence is insufficient to support

his conviction because the States failed to prove ownership of the residence and possession of the marijuana.

Sergeant Goodwin testified that while they were searching the house "the guy drove up that said he owned the house" and identified "the guy" as the defendant. The defendant accompanied the officers inside the house to determine if anything had been taken. Goodwin also stated that the defendant declined to prosecute the two burglars "for burglarizing his home."

Marijuana was found in a trunk in one of the bedrooms of the house and in the trunk of the burglars' car. The lock had been pried off the trunk. One of the suspects was seen carrying a large black-colored

garbage bag and the other with a large paper sack.

There was no motion for a judgment of acquittal at the close of the State's evidence. The defendant was the only witness to testify for the defense. After his testimony, defense counsel requested a directed verdict which was denied by the trial court which found "that the issue of the knowledge of the accused with regard to the presence of controlled substance is a question for the jury."

Where the motion to exclude or the request for a directed verdict was not made at the close of the State's case but only after both the State's case-in chief and the defense had been presented, this Court may consider all the evidence presented

before the motion was made in determining the sufficiency of the evidence to sustain the conviction. Norris v. State, 455 So.2d 226, 227 (Ala.Dr.App. 1984).

However weak the State's case may have been, we do not believe it was insufficient. The inference was reasonable that the defendant resided in and owned the house. There was nothing to indicate that someone else lived there. The jury could also infer that the suspects were carrying marijuance away from the house and placing it in their car. "Knowledge of the presence of the prohibited substances may be established by circumstantial evidence, and guilt does not depend upon ownership." Collier v. State, 413 So.2d 396, 402 (Ala.Cr.App. 1981), affirmed, Ex parte

Collier, 413 So.2d 403 (Ala. 1982). Moreover, the defendant's own testimony rendered the question of his guilt or innocence one for the jury. The defendant denied any knowledge of the marijuana and testified to the effect that the two burglars must have left the marijuana in exchange for the $3500 which they took from his trunk. The defendant admitted that the trunk was his and that no one else had access to it. He claimed that his brother owned the house but that he and his wife lived there because his brother had been working for about a year in another state. The defendant testified that his mother and two brothers had access to the house. He also stated that, on the morning of the burglary, his neighbor telephoned

him at work and said, "Mance, somebody is breaking in your house."

Under these circumstances, the question of the defendant's knowledge of the presence of the marijuana was properly submitted to the jury. Cumbo v. State, 368 So.2d 871 (Ala. Cr.App. 1978), cert. denied, Ex parte Cumbo, 368 So.2d 877 (Ala. 1979). The facts of this case are factually distinguishable from those of Temple v. State, 366 So.2d 740 (Ala.Cr.App. 1978).

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

APPENDIX "A-2"

FEB 12 1985

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JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

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"It would defy reason to suppose that . . . (the police) had to leave the area and secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested. It is only 'unreasonable' searches and seizures that the fourth amendment forbids." United States v. Singer, 687 F.2d 1135, 1144 (8th Cir. 1982), reversed on other grounds on rehearing, 710 F.2d 431 (8th Cir. 1983).

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However weak the State's case may have been, we do not believe it was insufficient. The inference was reasonable that the defendant resided in and owned the house. There was nothing to indicate that someone else lived there. The jury could also infer that the suspects were carrying marijuana away from the house and placing it in their car. "knowledge of the presence of the prohibited substance may be established by circumstantial evidence, and guilt does not depend upon ownership."

Collier v. State, 413 So.2d 396, 402 (Ala.Cr.App. 1981), affirmed, Ex parte Collier, 413 So.2d 403 (Ala. 1982).

In reaching our conclusion that the question of the defendant's knowledge and possession of marijuana, as presented by the State's evidence, was properly presented to the jury, we have been guided by the following principles:

> "In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State and accord the State all legitimate inferences therefrom. The evidence must be considered in the light most favorable to the prosecution." (citations omitted). Johnson v. State, 378 So.2d 1164, 1169 (Ala.Cr.App.) cert. quashed, Ex parte Johnson, 378 So.2d 1173 (Ala. 1979).
>
> "In reviewing a conviction based on circumstantial evidence, this court must

> view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude." Cumbo v. State, 368 So.2d 871, 874 (Ala.Cr.App. 1978), cert. denied, Ex parte Cumbo, 368 So.2d 877 (Ala. 1979).

The defendant testified in his own behalf and denied any knowledge of the marijuana and testified to the effect that the two burglars must have left the marijuana in exchange for the $3500 which they took from his trunk. The defendant admitted that the trunk was his and that no one else had access to it. He claimed that his brother owned the house but that he and his wife lived there because

his brother had been working for about a year in another state. The defendant testified that his mother and two brothers had access to the house. He also stated that, on the morning of the burglary, his neighbor telephoned him at work and said, "Mance, somebody is breaking in your house."

Under these circumstances, the question of the defendant's knowledge of the presence of the marijuana was properly submitted to the jury. Cumbo, supra. The facts of this case are factually distinguishable from those of Temple v. State, 366 So.2d 740 (Ala.Cr.App. 1978).

The opinion issued on original submission is withdrawn. The judgment of the circuit court is

affirmed and the application for rehearing is overruled.

ORIGINAL OPINION WITHDRAWN;
OPINION SUBSTITUTED;
JUDGMENT AFFIRMED;
RULE 39(k) MOTION DENIED;
APPLICATION FOR REHEARING
OVERRULED.

All Judges Concur.

APPENDIX "B"

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

April 19, 1985

84-506

EX PARTE: MANCE JUNIOR TERRY

PETITION FOR WRIT OF CERTIORARI

(Re: Mance Junior Terry v. State)

CRIMINAL APPEALS 6/516

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

BEATTY, J. - MADDOX DIVISION CONCURS.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19 day of April 19 85.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX "C"

a) United States Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

b) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I, Ronda H. Lacey, a member of the Bar of the Supreme Court of the United States and the Attorney for Mance Junior Terry, the Petitioner, do hereby certify that on this _____ day of June, 1985, I did serve the requisite number of copies of the foregoing on the Attorney General of the State of Alabama, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Honorable Charles Graddick
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Ronda H. Lacey

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